

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAYMOND TRIMM)	
Claimant)	
)	
VS.)	
)	
FRANK BILLS TRUCKING, INC.)	
Respondent)	Docket No. 1,020,599
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 28, 2005 preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) ordered that temporary total disability compensation is to be paid by respondent at the rate of \$449 per week commencing June 8, 2005, until further order or until claimant reaches maximum medical improvement (MMI), is released to a regular job or returns to gainful employment. The ALJ also ordered that medical treatment by Dr. Dennis Cowan be paid by the respondent until further order or until claimant reaches MMI. The ALJ further noted that respondent agreed to provide the services of Dr. Terry Rothstein, that respondent agreed to pay bills or had already paid medical bills per claimant's exhibit, and that respondent had agreed to furnish claimant with the services of a caregiver. The ALJ ordered respondent to compensate claimant's wife as the caregiver at the rate of \$400 per week. Further, the ALJ ordered respondent to establish an account on behalf of claimant with a pharmacy and that all prescriptions by Dr. Stanley Handshy or other authorized health care providers are ordered paid by respondent.

The respondent argues that the ALJ exceeded his jurisdiction in ordering payment of certain medical bills and other expenses, including home health care fees, which were not noticed for hearing and were not part of the proceedings on the record.

Claimant states that the parties had an off-the-record discussion before the Preliminary Hearing, at which time all issues were resolved except the referral to Dr. Cowan, the issue of temporary total and how caretaker services should be provided. Claimant also contends that respondent made no objection to the remaining issues being taken up and did not object when the court announced the agreement on the record. Therefore, claimant asserts that if there was a defect in any of claimant's seven-day demands for compensation, notice of intent letters, certifications of denial of the requested benefits, or the applications for hearing, those defects were waived. Claimant, however, also asserts that he had provided respondent with the proper documentation and notice when he set the matter for hearing before the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

This workers compensation claim previously came before the ALJ for a preliminary hearing on March 3, 2005, after which the ALJ entered an order requiring respondent to pay temporary total disability compensation until further order or until claimant is certified as being at MMI, is released to return to his regular job or returns to gainful employment. The ALJ also ordered medical treatment paid by respondent with Dr. Handsby and all referrals until further order or until claimant is MMI. The respondent appealed that order to the Board on the issue of whether claimant's accidental injury arose out of and in the course of employment. In its Order entered May 31, 2005, the Board affirmed the ALJ, finding that claimant's injuries did arise out of and in the course of his employment with respondent.

Beginning July 11, 2005, through September 28, 2005, claimant filed five separate form E-3 applications for preliminary hearing, certificates of denial and seven-day demand letters. In his Application filed July 11, 2005, claimant asked for payment of temporary total disability compensation. In his Application filed August 15, 2005, claimant asked for payment of certain medical bills. In his Application filed September 2, 2005, claimant asked for authorization for a caretaker. In his Application filed September 19, 2005, claimant requested authorization for a neuropsychological evaluation by Dr. Cowan and reinstatement of temporary total disability compensation. On September 28, 2005, claimant requested authorization for eyeglasses prescribed by Dr. Rothstein.

On September 16, 2005, claimant's attorney sent a notice of a preliminary hearing scheduled for October 27, 2005. On October 12, 2005, claimant's attorney again sent a notice scheduling this case for preliminary hearing. In that letter, claimant's attorney referenced the original issue as "TTD" and additional issues as "[a] neuropsychological

evaluation with Dr. Cowan, authorization of eyeglasses, payment of mileage, and medical treatment of Dr. Handshy, including pain medications.”¹

On October 14, 2005, claimant filed an Application for Penalties requesting penalties against respondent for its failure to make payments pursuant to the Order of the ALJ dated March 8, 2005. It does not appear that a hearing has been held on this Application for Penalties.

A preliminary hearing was held on October 27, 2005. Before the hearing commenced, there was an off-the-record discussion of the issues. After the parties went on the record, the ALJ stated:

As we've discussed off the record, claimant is seeking medical treatment with Doctor Cowan. And also seeking medical treatment with Dr. Rothstein for his eyes. The treatment by Dr. Rothstein has been agreed to by the respondent. Temporary total disability from 6/8/05 until further order. Payment of medical bills, we went over the bills and respondent has agreed with [sic] all of the bills that are submitted should be paid or have been paid. The compensation rate is \$449 per week. Claimant is also seeking the provision of a caretaker by the respondent and that has been agreed to as well. So the issues in dispute would be the temporary total disability and the referral to Dr. Cowan.²

Claimant's wife, Veronica Tarrant, testified concerning the problems she and claimant had filling prescriptions and that respondent had terminated payment of temporary total disability compensation on June 8, 2005. She also testified that she had to close her restaurant business because she could not run that business and take care of claimant. She stated that she has been claimant's full-time caregiver since the date of the accident. Ms. Tarrant testified that before starting her restaurant, she earned from \$400 to \$500 a week working at the Outback Steakhouse. At this point, respondent's attorney objected, stating:

I don't know what this has to do with whether or not the referral with Dr. Cowan would be authorized or not, or whether temporary total needs to be reinstated.

. . . .

JUDGE AVERY: Well, I've ordered in the past of the respondent to provide the services of caretaker in the form of a spouse and that's often the most practical way to do it, so she's trying to set some sort of financial value, what's the worth of

¹ Claimant's letter to ALJ dated October 12, 2005.

² P.H. Trans. (Oct. 27, 2005) at 3-4.

her services. So I don't think there's anything that should be objected to or anything worth objecting to, otherwise I'll overrule it.³

Respondent claims the ALJ lacked jurisdiction to decide issues beyond the claimant's Demand for Compensation arising out of the ALJ's March 8, 2005 Order. Further, respondent contends the ALJ exceeded his jurisdiction in ordering respondent to pay medical and caretaker expenses which were not part of the original order. In the "Summary of Evidence" listed in its brief to the Board, respondent mentions only claimant's Application for Penalties dated September 30, 2005, and claimant's letter of October 12, 2005, but makes no mention of the five Applications for Preliminary Hearing filed by claimant. The hearing held on October 27, 2005, was not a hearing on the issue of penalties but was a preliminary hearing on the issues presented by claimant in his various applications for preliminary hearing.

Respondent, in its brief, framed the issue on appeal as follows:

The Administrative Law Judge lacked jurisdiction to decide issues beyond the claimant's Demand for Compensation arising out of the Court's March 8, 2005 Order. Furthermore, the Administrative Law Judge exceeded his jurisdiction in ordering respondent to pay medical and caretaker expenses, which were not part of the original Order.⁴

Respondent then asked the Board for the following relief: "Respondent respectfully requests the Board reverse that part of the Preliminary Hearing Order of October 27, 2005 which was outside the jurisdiction of the Administrative Law Judge."⁵

In between respondent's statement of the issues and its prayer for relief, the only part of the ALJ's Order that is specifically identified as objectionable or "outside the jurisdiction of the Administrative Law Judge" is the naming of respondent's wife as the caretaker.

In the present case respondent was denied notice and an opportunity to be heard on certain issues upon which the Administrative Law Judge ultimately ruled. Claimant never filed an Application for Hearing on the issue of provision of the services of a caretaker. Further, respondent did not receive copies of documents supporting bills beyond those referenced in the March 8, 2005 Order, until the day of the Preliminary Hearing. Respondent generally agreed, off-the-record, to pay reasonable and necessary medical expenses however, it made no specific agreement to pay claimant's wife the sum of \$10.00 per hour for 40 hours per week

³ *Id.* at 8-9.

⁴ Respondent's Brief at 6 (filed Dec. 12, 2005).

⁵ *Id.* at 8.

of alleged caretaking services for claimant. When respondent objected to the testimony of claimant's wife concerning the nature and value of her services, the Administrative Law Judge simply overruled respondent's objection, stating that is what he always did in such cases.

Clearly, the presentation of evidence concerning the value of claimant's wife's services as the caretaker, or even the appropriateness of claimant's wife serving as a caretaker in this particular claim, were outside the scope of the March 8, 2005 Order. This issue was not a subject of claimant's Application for Penalties, nor was it included in claimant's letter to the Court regarding the issues for the October 27, 2005 hearing.⁶

Respondent's belated objection to notice is overruled. A timely specific objection to the notice was not made at the preliminary hearing. Furthermore, respondent waived its objection to the medical bills by agreeing to pay those bills. With regard to the issue of a caretaker, respondent admits that the claimant's authorized treating physician, Dr. Handshy, wrote a prescription order in August 2005 stating that claimant "needs a caretaker."⁷ At the Preliminary Hearing, respondent agreed to furnish the services of a caretaker. Respondent did not agree to claimant's wife being that caretaker, although it is not clear whether that option was discussed before the hearing. When claimant's wife took the stand to testify concerning the value of the caretaker services she was providing claimant, respondent's counsel made the objection quoted above. Respondent's objection went to the question of relevance, not notice. The ALJ overruled the objection to claimant's wife's testimony. The parties had agreed at the outset of the preliminary hearing that a caretaker would be provided by respondent. Respondent cannot now assert that it was denied notice of the issue of naming a caretaker.

In its brief, respondent quotes this portion of K.S.A. 44-534a(a)(2):

[I]f the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.⁸

Presumably, respondent is contending it was somehow denied the opportunity to present evidence. However, no such allegation or request was made to the ALJ at the hearing. Respondent is correct that the question of who the caretaker would be was not

⁶ *Id.* at 7-8.

⁷ P.H. Trans. (Oct. 27, 2005), Cl. Ex. E. The date on the prescription is illegible, but at page 7 of the Preliminary Hearing transcript Ms. Tarrant states that Dr. Handshy prescribed a caretaker on August 5.

⁸ Respondent's Brief (filed Dec. 12, 2005) at 7.

identified as an issue at the outset of the hearing. Nevertheless, respondent had been aware of the court-ordered physician's order for a caretaker for at least two months and, insofar as the record shows, had done nothing. Claimant's wife had quit her job in order to provide those services. Claimant was seeking payment for those past services and authorization to continue performing them as the authorized caretaker. Respondent did not suggest an alternative nor did it seek to keep the record open to provide one. In fact, when the ALJ asked respondent's counsel at the Preliminary Hearing whether he had anything else to offer, he answered "that's all I have."⁹ Accordingly, respondent's allegation that it was denied an opportunity to present evidence is likewise without merit.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.¹⁰ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.¹¹

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.¹²

The Board concludes the ALJ had the power to hear and decide the matters before him at the preliminary hearing and did not exceed his jurisdiction in entering his Order for Compensation.

WHEREFORE, it is the finding, decision and order of the Board that the respondent's appeal of the Order for Compensation of Administrative Law Judge Brad E. Avery dated October 28, 2005, should be and is hereby dismissed.

IT IS SO ORDERED.

⁹ P.H. Trans. (Oct. 27, 2005) at 14.

¹⁰ K.S.A. 44-551.

¹¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

¹² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

Dated this _____ day of January, 2006.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director